

<sup>1</sup> This is actually a Post-Award matter, however the ALJ designated his order as a “Preliminary Decision”. For the sake of consistency and clarity, all references to his decision will be addressed as titled.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Following the entry of an Award granting claimant permanent total disability benefits, respondent sought vocational assistance for claimant in the hopes of increasing the likelihood that she might become reemployed. Respondent retained the services of Dan Zumalt, a vocational rehabilitation counselor. He proposed meeting with claimant on January 19, 2005, with the intention of obtaining "some background information regarding the claimant including her work history, medical status/restrictions, areas of interests and other areas that might be relevant in returning her to work."<sup>2</sup>

Claimant's counsel filed a motion for protective order contending the ALJ had no jurisdiction to compel claimant to participate in the vocational assessment. Claimant also contends that any attempt to require her to participate in a job placement program is improper as the Court of Appeals has affirmed the factual finding that she is permanently and totally disabled. Her condition has not changed since then and without any evidence to the contrary, a vocational assessment is not necessary and poses a hardship to claimant.

The ALJ agreed with claimant and issued an order denying respondent's request. He reasoned "[w]hile theoretically this elderly lady's opportunities may have indeed improved, no authority to compel her to confer with this new expert is known, in contrast to an examination by a health care provider. . . so the request is denied."<sup>3</sup>

The Board has considered the parties' arguments and finds the ALJ's decision should be affirmed. Vocational rehabilitation was eliminated from the Kansas Workers Compensation Act in 1993. From that point forward, vocational rehabilitation benefits became voluntary. Respondent is certainly entitled to apply for review and modification under K.S.A. 44-528. However, the Board, as did the ALJ, finds that there is no statutory authority to compel claimant to participate in the vocational assessment respondent proposes. The ALJ certainly has the jurisdiction to order claimant to appear for medical examinations as set forth in K.S.A. 44-516, 44-510e(a), 44- 515 and 44-528, but he has no power to direct the claimant to participate in any other evaluation process. Despite respondent's belief, K.S.A. 44-551(b)(1) does not authorize the relief respondent seeks. In fact, the entire tenor of respondent's argument stems from respondent's displeasure at the Board and the Court of Appeals findings and is nothing more than a thinly veiled attempt to relitigate the underlying issues of the nature and extent of claimant's impairment.

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<sup>2</sup> Respondent's Brief at 2 (filed Mar. 28, 2005).

<sup>3</sup> ALJ Preliminary Decision (Feb. 18, 2005). See footnote 1.

**WHEREFORE**, it is the finding, decision and order of the Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated February 18, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant  
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director